U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13092513

Date: JAN. 5, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a developer of software for online advertising, seeks to employ the Beneficiary as a software test engineer under the second-preference, immigrant visa classification for members of the professions holding advanced degrees. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Nebraska Service Center denied the petition and dismissed the Petitioner's following motion to reconsider. The Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage of the offered position.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* A labor certification also signifies that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the accompanying labor certification states the proffered wage of the offered position of software test engineer as $101,837 a year. The petition's priority date is July 11, 2019, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner submitted copies of its federal income tax returns for 2017 and 2018. At the time of the Director's decision, more recent returns were not yet available. The Petitioner's fiscal year runs from April 1 through March 31. Thus, the tax returns do not cover the required period from the petition's priority date of July 11, 2019, onward. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence"). The tax returns therefore do not establish the Petitioner's ability to pay the proffered wage.

The Petitioner also submitted copies of a profit/loss statement, bank accountant statements, and records of the company's wage payments to the Beneficiary from July 2019 through February 2020. These materials cover the relevant period from the petition's priority date onward. But the materials do not constitute one of the three regulatory required forms of evidence: annual reports; federal tax returns; or audited financial statements. The Petitioner's chief financial officer attested to the accuracy of the profit/loss statement. But, contrary to the requirements of 8 C.F.R. § 204.5(g)(2), the statement does not constitute an "audited" financial statement. The materials therefore do not establish the Petitioner's ability to pay the proffered wage.

On appeal, the Petitioner argues that the statements and payroll records show its ability to pay the proffered wage from the petition's priority date onward. Because the evidence does not include at least one form of regulatory required evidence, however, the materials alone do not establish the Petitioner's ability to pay. The Petitioner further notes that 8 C.F.R. § 204.5(g)(2) states: "In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by the [immigration service]." The regulation, however, does not state that such additional materials can substitute for the required evidence of annual reports, federal tax returns, or audited financial statements. *See* 8 C.F.R. § 204.5(g)(2) (stating: "Evidence of this ability [to pay a proffered wage] *shall be* either in the form of copies of annual reports, federal tax returns, or audited financial statements") (emphasis added). The Petitioner therefore has not demonstrated its ability to pay the proffered wage.

Also, USCIS records show the Petitioner's filing of a Form I-140 petition for another beneficiary.[1] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore

[1] USCIS records identify the other petition by the receipt number

demonstrate its ability to pay the combined proffered wages of this petition and any other petitions that were pending or approved as of this petition's priority date or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

USCIS records indicate the Petitioner's filing of its other Form I-140 petition after this petition's priority date of July 11, 2019, and that beneficiary's pending application for adjustment of status. The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of both petitions in 2019 and 2020. The record, however, lacks the proffered wage and priority date of the other petition. Thus, USCIS cannot calculate the total combined wage amount that the Petitioner must demonstrate its ability to pay. For this additional reason, the Petitioner has not demonstrated its ability to pay the proffered wage.

Regulatory required evidence of the Petitioner's ability to pay the proffered wage from the petition's priority date should now be available. We will therefore remand the matter.

On remand, the Director should ask the Petitioner to submit copies of annual reports, federal tax returns, or audited financial statements for 2019 and 2020. The Director should also ask the company to provide the proffered wage and priority date of its other petition. The Petitioner may also submit additional evidence of its ability to pay, including proof of any wage payments it made to the beneficiaries in 2019 or 2020 and materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

III. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the record also does not establish that the Beneficiary meets the minimum employment experience requirements of the offered position.

A petitioner must demonstrate a beneficiary's possession of all DOL-certified, job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum job requirements of a position. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears authority for setting the *content* of the labor certification") (emphasis added).

Here, the labor certification states the primary requirements of the offered position of software test engineer as a U.S. master's degree, or a foreign equivalent degree, in computer science or a related field, plus two years of experience.[3] Also, part H.14 of the labor certification, "Specific skills or other

[2] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions or after corresponding beneficiaries obtained lawful permanent residence.

[3] The labor certification also states the Petitioner's acceptance of an alternate combination of education and experience: a bachelor's degree and five years of experience. The record indicates the Petitioner's intention to qualify the Beneficiary

requirements," states that the position requires two years of experience working with specified technologies.

The Beneficiary's educational requirements are not at issue. But the record does not establish the intended nature of the required experience. Part H.6 of the labor certification states that the offered position requires two years of experience "in the job offered." Experience in the job offered means experience performing the key duties of the offered position. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *3 (BALCA Oct. 24, 2011). In part H.14 of the labor certification and in a letter, the Petitioner stated its additional acceptance of experience in a "related" occupation. In part H.10 of the labor certification, however, the Petitioner indicated the unacceptability of experience in an alternate occupation. Thus, the record does not demonstrate whether the Petitioner will additionally accept experience in a position other than the job offered.

On remand, the Director should ask the Petitioner for evidence of the intended nature of the required experience, such as copies of its advertisements for the offered position. Whether the Petitioner accepts experience in an alternate occupation or not, however, the record does not establish the Beneficiary's qualifying experience.

On the labor certification, the Beneficiary claims that, by the petition's priority date and before beginning work for the Petitioner in the offered position, he gained more than seven years of full-time, qualifying experience.[4] He stated that a U.S. software company employed him as a software test engineer from March 2008 through March 2015.

To support claimed qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(g)(1). The letter must contain the employer's name, title, and address, and describe the beneficiary's experience. *Id.*

The Petitioner provided a letter from the Beneficiary's claimed former employer. The letter states the Beneficiary's initial work at the company from May 2007 to March 2008 as part of his U.S. master's degree program. *See* 8 C.F.R. § 214.2(f)(10)(i) (authorizing qualified foreign students to participate in "curricular practical training programs"). Contrary to the information on the labor certification, however, the letter states that the company did not begin employing the Beneficiary until March 2009. The letter states his employment as a software test engineer until August 2013 and as a senior software test engineer from August 2013 through March 2015. Also, contrary to 8 C.F.R. § 204.5(g)(1), the letter does not describe the Beneficiary's experience in either position. The letter therefore does not establish the Beneficiary's qualifying experience in the job offered or in a related occupation.

The Petitioner also provided a letter from a purported former director of the Beneficiary's prior employer. The letter describes the Beneficiary's prior experience, including his work with the technologies specified in part H.14 of the labor certification. The letter, however, is not on the prior

for the offered position based on his possession of a master's degree and two years of experience. We therefore will not consider the Beneficiary's qualifications for the alternate requirements.

[4] A petitioner cannot rely on experience that a beneficiary gained with it, unless he or she gained the experience in a substantially different position than the offered one or the petitioner can demonstrate the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). The Petitioner here does not assert that the Beneficiary gained qualifying experience with it.

employer's stationery, and the record lacks evidence corroborating the signatory's claimed work for the employer during the Beneficiary's tenure there. Also, contrary to the employer's letter, the letter from the purported former director states the Beneficiary's employment from March 2008, rather than from March 2009, and indicates the Beneficiary's work in only one position. A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The letter from the purported former director therefore does not establish the Beneficiary's claimed, qualifying experience. Moreover, both letters lack reliable descriptions of the Beneficiary's prior work. Thus, the record does not establish his qualifying experience whether the Petitioner accepts related experience or not.

On remand, in addition to questioning the intended nature of the required experience based on the discrepancy between parts H.10 and H.14 of the labor certification, the Director should ask the Petitioner to explain the inconsistencies of record regarding the Beneficiary's employment history and provide independent, objective evidence of his claimed, qualifying experience.

IV. VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid only for the particular job opportunity, foreign national, and geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). USCIS may deny a petition if the accompanying labor certification does not cover the area of intended employment. *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979).

Here, the labor certification and the Form I-140 list the area of intended employment in Washington state. Online government records, however, indicate that Washington officials terminated the Petitioner's corporate registration there in 2019, about a month after the filing of the labor certification application. Wash. Office of the Sec'y of State, Corps. & Charities Filing Sys., "Business Search," https://ccfs.sos.wa.gov/#/ (last visited Dec. 9, 2020). The termination of the Petitioner's corporate registration suggests that the company no longer does business in Washington, casting doubt on the offered position's area of intended employment. The record therefore does not establish the validity of the labor certification.

On remand, the Director should ask the Petitioner to submit additional evidence of the company's intention to permanently employ the Beneficiary in the offered position at the location listed on the labor certification and Form I-140. If supported by the record, the Director may notify the Petitioner of any other potential grounds of denial.

The Director should afford the Petitioner a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

The record lacks regulatory required evidence of the Petitioner's ability to pay the proffered wage of the offered position from the petition's priority date onward. The Petitioner also has not: explained the intended nature of the minimum experience required for the position; demonstrated the Beneficiary's possession of the experience; or established the validity of the labor certification for the area of intended employment.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.